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No. 9, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Plaintiff,

VS.

STATE OF LOUSIANA, et al.
(Alabama and Mississippi Boundary Cases)

AMICUS CURIAE BRIEF OF THE STATE OF ALASKA IN OPPOSITION TO THE EXCEPTION OF THE UNITED STATES

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INTEREST OF THE STATE OF ALASKA

The State of Alaska is before this Court in another action (*United States v. Alaska*, No. 84, Original) to determine the extent of the submerged lands owned by the State along its north slope. A trial before the Special Master of certain issues in that action (primarily whether a formation known as Dinkum Sands constitutes an island for purposes of delimiting Alaska's submerged lands boundary) began on July 16, 1984, and concluded August 2. A subsequent trial on other issues in the case, including the application of straight baselines, is contemplated later this year or early in 1985.

Owing to the significant impact that the Court's decision and statements in this case may have on Alaska's case, the State has a substantial interest in the outcome of this

proceeding and must, therefore, address certain points raised by the report of the Special Master and briefs of the parties.

INTRODUCTION AND SUMMARY

The State of Alaska is confronted with federal claims to submerged lands similar to those encountered by other coastal states. The United States confirmed in Alaska upon the State's admission to the Union rights equal to those enjoyed by most other coastal states in its offshore territory. See Alaska Statehood Act, Pub. L. No. 85-503, §§ 2, 6(m) 72 Stat. 339 (1958). Alaska has been sued by the United States, in this Court's original jurisdiction, over those rights, and the Court has referred the case to a special master. 444 U.S. 1065. The *Alaska* case concerns the northern seaward boundaries of the State of Alaska from Icy Cape, southwest of Point Barrow, to the Canadian border. That segment of Alaska's coastline is nearly as long as the entire California coastline.

The national Government has been accorded in the submerged lands cases exceptional deference—some would say inordinate deference[1]—to the position it elects on the particular occasion to take. Given that fact, and given the pendency of the *Alaska* case, which raises questions related to those raised by the United States in its Exception and by the Special Master in his Report in this case, Alaska desires to correct certain flawed or misleading points in the Exception and Report lest they go unquestioned now and cause unnecessary problems in the *Alaska* case.

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[1]Charney, Judicial Deference in the Submerged Land Cases, 7 Vand. J. Trans. L. 383 (1974).

Generally, we endorse the Special Master's decision that Mississippi Sound is both a juridical bay and a historic bay under the criteria established by the Court. In two respects, which are not essential to that decision, however, the Special Master briefly touches on subjects of vital importance in the *Alaska* case: (1) the United States policy of assimilating "objectionable pockets of high seas"[2] and (2) the application of straight baselines. In its Exception, the United States glosses over these subjects in a footnote. Exception 6, n. 2.

First, in an introductory paragraph, the Special Master declines to assimilate the enclaves in Mississippi Sound to the territorial sea, preferring instead to determine the issue under the rules for juridical and historic bays. The Master's passing treatment of this subject, however, does not take note of the critical fact that the official policy of the United States from 1930 until at least 1961 was to assimilate objectionable pockets of high seas. Moreover, the Special Master mistakenly suggests that the 1930 Hague Conference and the International Law Commission rejected such assimilation policies. The Solicitor General understandably neglects to correct these errors; thus, we point them out and briefly describe the factual background of this issue, which will be fully developed in the *Alaska* case.

Second, the Special Master declines to apply a system of straight baselines to delimit Alabama's and Mississippi's submerged lands. The Special Master's brief discussion of this subject (fewer than three pages) is devoid of any factual examination. There appear to be two reasons for

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[2]See Boggs, Delimitation of the Terminal Sea, 24 Am. J. Int'l L. 541 (1930).

this insubstantial treatment of the issue: (1) The Master expressly recognized that, in light of his decision that Mississippi Sound is both a juridical and historic bay, any decision on straight baselines was inconsequential and (2) the Master felt that language from prior opinions of the Court precluded the particular arguments advanced by Alabama and Mississippi. We point out that the Court's prior opinions are not quite so confining and that the Master did not mention certain critical pronouncements by the Court. Additionally, in light of the Special Master's resolution of this case under the rules for juridical and historic bays, and the consequent curtailed treatment of straight baselines, Alaska notes that any significant decision or discussion regarding straight baselines by the Court may be better made in the pending *Alaska* case, where the issue will be squarely and fully addressed.

The Special Master's conclusion that the submerged lands of Mississippi Sound belong to Mississippi and Alabama is supported by two considerations which receive no mention in his Report. The first is that the Submerged Lands Act, except in the case of islands far removed from the mainland coast, contemplated a single, contiguous legal boundary. In the present case, it would do violence to the clear intent of Congress to hold the United States to own isolated "enclaves" of submerged lands wholly surrounded by state-owned lands.

The second consideration is that the Submerged Lands Act was intended not merely as a grant of certain described lands, but as an extension of the equal footing doctrine to those lands. Since Louisiana has been held to own the "enclaves" of submerged lands lying between its mainland

coast and the Chandeleur Islands, a different result in the present case would put Mississippi and Alabama on an unequal footing with their sister Gulf state. These points are treated in parts C and D of this brief.

Finally, in a point that has acute importance for the late-admitted State of Alaska, we observe that the Executive has no power, whether through its foreign relations or through its management of federal resources, to alter the Congressionally approved boundaries of a state. The result the United States seeks in this case would have precisely that effect.

ARGUMENT

A. When Alaska Became A State And Acquired The Submerged Lands Beneath The Territorial Sea Off Its Coasts, The Official Position Of The United States Was To Assimilate "Objectionable Pockets" Of High Seas To The Territorial Sea; The Alaska Statehood Act Expressly Defines The State As "All The Territory, Together With The Territorial Waters Appurtenant Thereto, Now Included In The Territory of Alaska"

Alaska will show, when its case is tried before the Special Master and later briefed before this Court, that, by virtue of the United States policy of assimilating "objectionable pockets of high seas" to the territorial sea, the United States granted to Alaska the submerged lands beneath such so-called pockets of high seas off Alaska's coasts. Upon admission to the Union on January 3, 1959, Alaska acquired, by Congressional grant, the submerged lands beneath the territorial sea off its coasts. Pub. L. 85-503, 72 Stat. 339 (1958). The territorial sea, under the official position of the United States at that time, included the pockets

of ostensible high seas that would be produced by rigid application of the arcs-of-circles method of delimitation. The State, thus, acquired the submerged lands beneath such pockets.

Subsequent policy changes by the Executive regarding delimitation of the territorial sea did not, and constitutionally could not, divest Alaska of submerged lands previously granted by Congress. The United States maintained its policy of assimilating objectionable pockets of high seas from 1930, when the United States proposed articles regarding such assimilation to the Hague Conference, to at least 1961, when the United States ratified the Geneva Convention on the Territorial Sea and the contiguous Zone. This much is readily documented. It remains, moreover, open to question whether and how long the United States maintained its assimilation policy thereafter, since that policy produces territorial seas well within the geographic limits authorized by the Convention. In any event, whenever the United States changed its policy, that change did not divest Alaska—or Mississippi or Alabama—of Congressionally granted submerged lands. Only the whole Congress can establish a state's boundaries or dispose of territory within a state, not the federal Executive either acting alone or with the advice and consent of the Senate ostensibly in the name of foreign relations. U.S. Const., art. II, § 3; *United States v. Louisiana*, 363 U.S. 1, 35 (1960).

In this case, the Special Master briefly addresses contentions by Alabama and Mississippi regarding assimilation of enclaves of high seas. Unlike Alaska's position, however, these contentions, as described by the Master, appear to treat the matter as a current policy question, rather than

a question of the historical facts of actual United States policy.

The distinction is crucial. The Master does not even note that the official policy of the United States for more than 30 years was to assimilate such enclaves, although he does recognize and confirm that the United States adhered to the 10-mile closing rule for fringing islands. Report 5-6. Without considering the historical facts or their legal and constitutional implications, the Master assumes the case is governed by the Geneva Convention. While the Convention may usefully serve to supply rules and definitions in certain circumstances, *United States v. California,* 381 U.S. 139 (1965); *United States v. Louisiana,* 394 U.S. 11 (1969), it may not be used to turn back the hand of time and, in contravention of the Constitution, repeal the effect of history.

The Special Master also mistakenly notes that the 1930 Hague Conference and the International Law Commission considered and rejected proposals for the assimilation of pockets of high seas. The 1930 Hague Conference did not reject such an assimilation proposal. The United States presented a detailed assimilation proposal to the Conference on March 27, 1930. The work of the subcommittee to which the proposal was referred was stymied, however, by the failure of the Conference to reach agreement on the breadth of the territorial sea. In fact, the Second Committee of the Conference was prevented by that failure of agreement from making even a provisional decision on the articles drawn up by the subcommittee. Report of the Second Commission (Territorial Sea), League of Nations Doc. C.230.M.117.1930.V. (1930). The incomplete work of the

Hague Conference can hardly be characterized as a rejection of the United States proposal.

Similarly, the International Law Commission did not reject the United States assimilation proposal. Indeed, the United States did not even present such a proposal to the Commission. Assimilation of enclaves was considered by the Commission over a period of years only in connection with the proposed article on straits; as finally reported, that article did not include an assimilation provision. The much more comprehensive United States policy was not discussed and, accordingly, never rejected. And, in fact, from 1930 to 1961 the United States employed the methods set forth in the 1930 proposal for delimiting its territorial seas, as Alaska's evidence at the forthcoming evidentiary hearing on this question will show.

B. Because The Special Master's Brief Discussion Of Straight Baselines Is Unnecessary To The Decision, Any Decision Or Discussion On That Issue By The Court Should Be Made When The Question Is Fully Developed In The Alaska Case

The Special Master devotes barely more than two pages of his Report in this case to the issue of straight baselines, an issue of great importance in the pending *Alaska* case. The Master engages in no factual analysis and, instead, deems the state's arguments in this case completely foreclosed by language from prior opinions of the Court. Important to the Master's discussion on straight baselines was his recognition that acceptance of present United States policy on that question "has resulted in no contraction of the recognized territory of the States of Alabama and Mississippi for reasons that will hereafter appear." Report 7.

Those reasons, of course, were that Mississippi Sound was both a juridical and a historic bay. The Master's conclusions regarding straight baselines were, thus, of no consequence to the territorial boundaries of the states and, in fact, were unnecessary to the Master's ultimate decision.

Moreover, the Special Master's passing treatment of straight baselines in this case disregards certain critical pronouncements by the Court. Relying on language from *United States v. California,* 381 U.S. 139 (1965) and *United States v. Louisiana,* 394 U.S. 11 (1969), the Master cut short his inquiry into the straight baselines issue, feeling that the states' arguments are completely foreclosed. Disregarded in the Master's discussion, however, is the express admonition in *United States v. Louisiana* that the Court did *not* mean to preclude a state from arguing that the United States had actually employed a system of straight baselines and later sought to abandon that policy solely to gain advantage in a lawsuit with the state:

> It might be argued that the United States' concession [in earlier stages of the litigation that areas between the mainland and all offshore islands were inland waters] reflected its firm and continuing international policy to enclose inland waters within island fringes. It is not contended at this time, however, that the United States has taken that posture in its international relations to such an extent that it could be said to have, in effect, utilized the straight baseline approach sanctioned by Article 4 of the Convention. If that had been the consistent international stance of the Government, it arguably could not abandon that stance solely to gain advantage in a lawsuit to the detriment of Louisiana. Cf. United States v California, 381 US 139, 168, 14 L Ed 2d 296, 314, 85 S Ct 1401: "[A] contraction of a State's recognized territory imposed by the Federal

> Government in the name of foreign policy would be highly questionable." We do not intend to preclude Louisiana from arguing before the Special Master that, until this stage of the lawsuit, the United States had actually drawn its international boundaries in accordance with the principles and methods embodied in Article 4 of the Convention on the Territorial Sea and the Contiguous Zone.
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> *United States v. Louisiana,* 394 U.S. at p. 48, n. 97.

Because the Special Master mistakenly failed to consider and weigh the arguments and evidence presented on straight baselines, and because the Master's abbreviated discussion of that issue is unnecessary to the decision in this case, Alaska submits that the Court should await the pending *Alaska* case for making any decision or pronouncement regarding straight baselines. In the *Alaska* case, the issue will be squarely presented and fully developed both at trial and in the briefs to the Court. Indeed, Alaska will present evidence at that time demonstrating that the United States long ago would have adopted a system of straight baselines for the purpose of delimiting its coastline but for the effect such adoption would have on litigation with the several coastal states regarding the Submerged Lands Act.

C. The Submerged Lands Act Granted To The States All The Submerged Lands Between The States' Most Seaward Contiguous Boundary And The Mainland, Even If Some Of Those Submerged Lands Are Slightly More Than Three Miles From The Line Of Ordinary Low Water Along The Mainland Or Nearby Barrier Islands

In section 3(a) of the Submerged Lands Act, 43 U.S.C. § 1311(a), Congress granted to the states all "the lands beneath navigable waters within the boundaries of the

respective States." With respect to offshore submerged lands, sections 2(a)(2) defines the term "lands beneath navigable waters" as including all lands from the line of mean high tide "seaward to a line three geographical miles distant from the coast line of each such State and to the boundary of each such State where in any case such boundary . . . extends seaward (or into the Gulf of Mexico) beyond three geographical miles." In turn, section 2(c), 43 U.S.C. § 1301(c), defines the term "coast line" as the "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." And section 2(b), 43 U.S.C. § 1301(b), defines "boundaries" as including a state's historical boundaries, but places a limitation on the distance those boundaries may extend from the coast line: "In no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico."

On a straight mainland coast with no offshore islands, boundary delimitation under the Submerged Lands Act is relatively simple. Where barrier islands exist between the mainland and the open sea, however, as in the case of Mississippi and Alabama, the task becomes more complex.

None of the water entrances from the Gulf of Mexico into Mississippi Sound exceeds six miles—*i.e.*, the distance between each of the barrier islands which separate Mississippi Sound from the "open sea" of the Gulf of Mexico is less than six miles, as is the distance between the mainland and the islands at either end of the chain. However, a

literal application of a three-mile limitation produces a small "enclave" or "pocket" of submerged lands totally surrounded by submerged lands that undisputedly belong to Alabama and Mississippi.

The United States claims that the Submerged Lands Act requires a literal application of the three-mile limitation on a state's boundaries, whether measured from the ordinary low water mark on the mainland, or from that on offshore barrier islands. The Act, however, simply cannot be construed to reach such a result.

First, section 3(a) vests in the several coastal states the "title to and ownership of the lands beneath navigable waters *within the boundaries* of the respective States." (Emphasis added.) As a matter of simple geography, there can be no dispute that such "enclaves" or "pockets" lie within the exterior boundaries of the states.

Second, section 2(a)(2) provides that the "lands within navigable waters" conveyed to the states are those which lie between the line of mean high tide and "*a line* three geographical miles distant from the coast line." (Emphasis added.) The Act uses the singular term, "a line," rather than a more open-ended designation (such as "any line"), implying that there is but one seaward boundary line for each state (at least where the water entrances between the mainland and various barrier islands do not exceed a total of six miles). Similarly, section 4 of the Act, 43 U.S.C. § 1312, speaks in terms of a single "seaward boundary . . . as *a line* three geographical miles distant from its coast line."

Finally, any doubt is eliminated by the definition of the term "coast line" in section 2(c): "The term 'coast line' means the line of ordinary low water *along that portion of the coast which is in direct contact with the open sea* and the line marking the seaward limit of inland waters." (Emphasis added.) Where, as in Mississippi Sound, there is a chain of barrier islands, neither the coast of the mainland nor the landward coasts of the barrier islands are "in direct contact with the open sea." Such a characterization applies only to the seaward coasts of the barrier islands. Under this definition of "coast line," the "line three geographical miles distant from the coast line"—the line which marks the outer limit of the "lands beneath navigable waters" conveyed to the states—is a three-mile line drawn only from the seaward coasts of the barrier islands, at least where (as is the case in *Mississippi Sound*) the water entrances between the mainland and the several barrier islands nowhere exceed six miles.

The United States apparently argues that the three-mile limitation on the extension of seaward boundaries from the coast line, contained in section 2(b) of the Act, compels the conclusion that the states' boundaries (and therefore the extent of the grant) in no event can exceed three miles, regardless of other geographical circumstances. However, the limitation goes only to a boundary "extending from the coast line more than three geographical miles *into the Atlantic Ocean or the Pacific Ocean*, or more than three marine leagues *into the Gulf of Mexico*" (emphasis added)—*i.e.*, into the "open sea." Neither Mississippi's nor Alabama's boundary must be extended more than three marine leagues—or even more than three geographical miles—into the Gulf of Mexico to include within their

boundaries the submerged lands underlying Mississippi Sound. While there are submerged lands within the Sound which are more than three geographical miles from the lines of ordinary low water along the mainland and the landward side of the barrier islands, all of those submerged lands are within the states' seaward boundaries—*i.e.*, the single contiguous boundary measured from that portion of the mainland and the barrier islands "in direct contact with the open sea."

Indeed, for the United States to prevail in this action, this Court must effectively rewrite the Submerged Lands Act in a number of respects. It must modify the definition of "lands beneath navigable waters" in section 2(a)(2) so as to include only those lands between the line of mean high tide and "*any* line three geographical miles distant from the coast line of each such State." Second, it must modify the three-mile limitation in section 2(b) to embrace not only the Atlantic and Pacific Oceans and the Gulf of Mexico, but as well "any other subordinate body of water." Finally, section 2(c) would have to be construed to read:

> The term "coast line" means the line of ordinary low water along that portion of the coast *of the main continent* which is in direct contact with the open sea and the line marking the seaward limit of inland waters, *and in the case of any island seaward of such coast, means the line of ordinary low water around such island.*

To reach this last result, however, the Court must do what Congress refused to do.

In the Senate floor debate on the Submerged Lands Act, Senator Douglas moved to amend the definition of "coast line" to read precisely as set out above. 99 Cong. Rec. 4240.

As the ensuing colloquy makes clear, Senator Douglas was concerned that the definition of "coast line" would permit expansive claims to be made by the various states where there were islands a substantial distance from the mainland —what Senator Douglas termed "remote islands" such as those lying off the coast of California. *Id.* Indeed, this Court has characterized Senator Douglas's amendment as addressing that precise circumstance: "Senator Douglas introduced amendments specifically designed to prevent States from claiming as inland waters those water areas between the mainland and *remote islands.*" *United States v. California*, 381 U.S. 139, 158 n.23 (emphasis added). Even Senator Douglas was, quite apparently, not attempting to address islands in close proximity to the mainland. *See* 99 Cong. Rec. 4242 (comments of Senator Douglas).

Commenting on the debate over Senator Douglas's amendment, this Court has noted that "[t]he colloquy leading to the rejection of these amendments is extremely revealing in the total absence of hostility to the basic idea which Senator Douglas was pursuing . . ." *United States v. California*, 381 U.S. at 158 n.23. Alaska agrees; there is little question that Congress did not contemplate remote islands serving as the basis for a state claim to all of the water areas between the mainland and those islands. However, there can be little question that Congress did contemplate the presence of near-shore barrier islands resulting in the states receiving title to the submerged land underlying intervening waters: Senator Douglas's amendment was defeated on a vote of 50 to 26, 99 Cong. Rec. 4243, primarily because of the effect such an amendment would have on Gulf state claims to submerged lands between the

mainland and near-shore barrier islands. *See* 99 Cong. Rec. 4241-4242 (comments of Senators Long, Daniel and Holland).

To the extent there may be any question regarding Congressional intent in this regard, the provisions of the Outer Continental Shelf Lands Act, Act of August 7, 1953, 67 Stat. 462, 43 U.S.C. §§ 1331 *et seq.*, make clear that "enclaves" or "pockets" of submerged lands more than three miles from the ordinary low water lines on the coast of the mainland and offshore islands, but completely surrounded by submerged lands less than three miles from such lines, belong to the states. Section 2(a) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a), defines the term "outer Continental Shelf" as "all submerged lands lying *seaward and outside of* the area of lands beneath navigable waters as defined in section 1301 of this title." (Emphasis added.) Even the most creative sophistry cannot characterize such "enclaves" or "pockets" of submerged lands as "lying seaward and outside" of the lands granted to the states under the Submerged Lands Act.

It is not surprising that Congress reached this result, since it was simply adopting the same method of delimitation which the United States used to delimit the territorial sea in its foreign relations. S. Whitmore Boggs, the Geographer for the Department of State, testified before the Senate Interior and Insular Affairs Committee in February 1951 that the United States "assimilated" such "enclaves" or "pockets" to the United States' territorial sea. Hearings on S.J. Res. 20 [providing for a continuation of oil and gas leases and operations on submerged lands], February 19-22, 1951, including conferences with Executive Departments on S. 940 ["quitclaim" of submerged lands], March 28 and

April 10, 1951, pp. 440-467 (April 10, 1951). According to Mr. Boggs, a literal application of a three-mile limitation, when delimiting the territorial sea, may result in "peculiar anomalies, with pockets of high seas," which then should be assimilated. *Id.*, p. 462. The assimilation doctrine is explained at greater length in two of Mr. Boggs' articles[3] included in the appendix to the hearing transcript.

Further, there is little doubt that the executive branch of the federal government considered such "enclaves" or "pockets" as having been included in the grant of lands to the states under the Submerged Lands Act. *See*, e.g., Joint Exhibit JT-64, in which then-Secretary of the Interior Oscar P. Chapman construed the boundary between state-owned submerged lands and federally-owned outer continental shelf as being three miles from the seaward coast line of the barrier islands forming Mississippi Sound. *Also see* the United States' concession in *United States v. Louisiana*, 363 U.S. 1, 66-67 n.108 (1960), that Louisiana was entitled to all the lands between the mainland and the barrier islands within three leagues of Louisiana's mainland.

Indeed, it was not until the early 1970s that the federal government began to contemplate the position it is urging in this case—*i.e.*, that such "enclaves" or "pockets" did not pass to the states under the Submerged Lands Act but instead are subject to the federal government's jurisdiction under the Outer Continental Shelf Lands Act. Even then, however, it was considered too unseemly to press the argument until more time had passed. *See* Mississippi Exhibit

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[3]Boggs, Delimitation of the Territorial Sea, 24 Am. J. Int'l L. 541 (1930), and Boggs, Delimitation of Seaward Areas Under National Jurisdiction, 45 Am. J. Int'l L. 240 (1951).

101, a memorandum from Jonathan I. Charney of the Justice Department dated June 6, 1972, suggesting that the argument not be raised until more time had passed.

Apparently, the United States now has determined that sufficient time has passed to blur the otherwise clear language of the Submerged Lands Act, the Outer Continental Shelf Lands Act and the administrative construction placed on both. In addition, it is apparent that the United States is banking substantially on the deference which this Court has indicated it will give to the United States' foreign policy position, a position which Alaska will show in its forthcoming trial on the straight baseline question has been adopted solely to minimize the grant of submerged lands to the states under the Submerged Lands Act and not for bona fide foreign policy purposes. To the extent, however, that the federal government's interpretation is entitled to some deference, its initial construction is entitled to more deference. After all, it is the government's contemporaneous construction which carries persuasive weight. *Udahl v. Tallman,* 380 U.S. 1, 16 (1965). "The [government's] current interpretation, being in conflict with its initial position, is entitled to considerably less deference." *Watt v. Alaska,* 451 U.S. 259, 273 (1981), citing *General Electric Co. v. Gilbert,* 429 U.S. 125, 143 (1976).

Under these circumstances, the Court could affirm the Special Master's decision that Alabama and Mississippi own all the submerged lands underlying Mississipi Sound on the independent ground that the Submerged Lands Act granted to Alabama and Mississippi all the submerged lands landward of their most seaward contiguous boundaries, including those underlying Mississippi Sound.

D. Since The Submerged Lands Act Was An Extension Of The Equal Footing Doctrine To Offshore Submerged Lands, Mississippi And Alabama Cannot Be Treated In A Manner Which Differs From That Afforded Their Sister State, Louisiana

As this Court noted in *United States v. California*, 436 U.S. 32, 37 (1978), "[t]he very purpose of the Submerged Lands Act was to undo the effect of this court's 1947 decision in *United States v. California*, 332 U.S. 19 [1947]." In other words, the Act was a congressional extension of the equal footing doctrine to the submerged lands underlying the territorial sea, lands that prior to the 1947 California decision were "assumed by many, and not without reason," to fall within the doctrine. *United States v. Louisiana*, 363 U.S. 1, 16 (1959); *see* Submerged Lands Act legislative history set out in 363 U.S. at 16-24.

There is no question that Louisiana owns the submerged lands between its mainland coast and the barrier islands lying fewer than three leagues offshore. *See United States v. Louisiana*, 363 U.S. at 66-67 n.108. Indeed, the federal government conceded the point at that time, *id.*, and later declined to withdraw that concession (at least with respect to the area consisting of Chandeleur Sound and Breton Sound). *United States v. Louisiana*, 394 U.S. 11, 66-67 n.87 (1969).

It would be anomalous indeed to hold that the congressional extension of the equal footing doctrine to offshore submerged lands granted Louisiana title to submerged lands between the mainland and offshore barrier islands, but granted no such title to Alabama and Mississippi. This

is particularly true where the geographic facts—the "enclaves" in controversy are completely surrounded by submerged lands undisputedly belonging to Alabama and Mississippi—are so compelling.

E. The Executive May Not, Without The Approval Of Congress, Renounce A State's Claim To Lands Within The State's Boundaries

Only Congress can establish a state's boundaries or dispose of territory within a state, not the Executive either acting alone or with the advice and consent of the Senate ostensibly in the name of foreign relations. *United States v. Louisiana*, 363 U.S. 1, 35 (1960). The United States Constitution vests such power in Congress:

> New States may be admitted by the congress into this Union . . .
>
> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.
>
> U.S. Const., art. IV, § 3, cl. 1 & 2.

When Alaska became a state in 1959 and acquired the submerged lands beneath the territorial sea off its coasts, the United States maintained a long-standing official policy of assimilating to the territorial sea enclaves of high seas that would be produced by using the arcs-of-circles method of delimitation. The State of Alaska, therefore, acquired as part of its Congressionally-granted territory the submerged lands beneath such enclaves.

Subsequent policy changes by the Executive regarding delimitation of the territorial sea did not, and constitutionally could not, divest Alaska—or any other state—of the submerged lands previously granted by Congress. Certainly, the treaty power may not be used to cede the territory of a state in circumvention of the Constitution. *De Goefroy v. Riggs,* 133 U.S. 258 (1890). It should be noted, moreover, that Article IV, section 3, clause 2, of the Constitution not only sets forth the power of Congress over the disposition of territory, it expressly protects the territorial rights of the states. A state's territory, therefore, cannot be ceded without its consent. As the Court remarked in *De Geofroy v. Riggs, supra:*

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of all government itself and of that of the States. *It would not be contended that it extends so far as to authorize* what the Constitution forbids, or a change in the character of the government, or in that of one of the States, or *a cession of any portion of the territory of the latter, without its consent.*
>
> *Id.* at 267, emphasis added.

Since Congress has not passed and the President has not signed any legislation purporting to disclaim some of the territory granted to the states under the Submerged Lands Act, it is manifest that under the Constitution the states retain all of their territory, including submerged lands beneath the so-called enclaves of high seas, notwithstanding any recent policy changes by the Executive with respect to such enclaves.

CONCLUSION

Alaska supports the Special Master's decision that Mississippi Sound is both a juridical and a historic bay. We note, however, that the Master's Report contains some mistaken or misleading statements regarding (1) assimilation of enclaves of high seas and (2) straight baselines. None of these statements is necessary to the decision. Accordingly, we submit that any significant decision or discussion by the Court regarding these issues may better be made in the pending *Alaska* case.

Respectfully submitted,

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